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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE,

Petitioner,

v.

JOHN FOSTER DULLES, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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JANUARY 1957.

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Loyalty Security Board of the Department of State is printed at R. 12-28. The opinion of the Loyalty Review Board is printed at R. 1-11. The opinion of the District Court is unreported and is printed at R. 85-88. The opinion of the Circuit Court of Appeals is reported at —— F. 2d —— and is printed at R. 92.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1956 (R. 98). The petition for certiorari was

filed September 11, 1955 (R. 99). The petition was granted November 13, 1956 (R. 99).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Statutes, Regulations and Constitutional Provisions Involved

This case involves:

(1) The Fifth Amendment to the Constitution of the United States, printed in Appendix A, *infra*, p. 51.

(2) The so-called McCarran Rider to various State Department appropriation acts (60 Stat. 458, 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768, and 65 Stat. 581), printed in Appendix A, *infra*, p. 51.

(3) Executive Order 9835 (12 Fed. Reg. 1935), printed in Appendix A, *infra*, p. 52, as amended by Executive Order 10241 (16 Fed. Reg. 3690), printed in Appendix A, *infra*, p. 60.

(4) Department of State Regulations and Procedures relating to Loyalty and Security of Employees, (a) as adopted March 11, 1949, printed in Appendix A, *infra*, p. 61 and (b) as revised May 4, 1951 and September 21, 1951, printed in Appendix A, *infra*, p. 73.

Questions Presented

1. Whether the Secretary of State can validly exercise his statutory discretion to discharge petitioner by acting solely on the findings and opinion of the Loyalty Review Board in a case where the Board had no jurisdiction and where the Board's procedures in critical respects violated

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[1] By letter of the Clerk, dated December 27, 1956, the time for filing the brief for petitioner was, on request of the petitioner, extended until January 15, 1957.

both the Fifth Amendment and the Executive Order under which it purported to act.

2. Whether the Secretary of State can validly exercise his statutory discretion to discharge Government employees in the interest of the United States without following the procedures prescribed for the exercise of that discretion by his own regulations.

3. Whether the Department of State can, as urged by the respondents, institute and conduct loyalty-security proceedings against petitioner under regulations and procedures of the Department in effect at the time the proceedings were commenced and then, following the dismissal of petitioner resulting from those proceedings, base that dismissal upon later regulations and procedures of which the petitioner was not given notice, which were not published in the Federal Register, and of whose existence the petitioner was not advised until this case was before the District Court.

Statement of the Case

The case comes to this Court from the affirmance by the Court of Appeals for the District of Columbia Circuit of a judgment in the trial court which granted part of the relief sought by the petitioner but denied his motion for summary judgment and granted respondents' cross motion. There was no testimony introduced by either side in the trial court. The statement of the case which follows is based on facts pleaded in the third amended complaint (R. 40-61) and admitted in the answer (R. 62-67), the admissions of respondents (R. 68-69), the affidavit of petitioner in support of his motion for summary judgment (R. 71-75), and the affidavit of the former Secretary of State in support of respondents' cross motion (R. 81-83). In addition, in order to explain how the case arose, the statement refers in places to the

transcript of the hearing before the Department of State Loyalty Security Board.[2]

From October 1935, until December 14, 1951, petitioner served continuously as a Foreign Service Officer of the United States, advancing by promotion to Class 2 of the Foreign Service (R. 41, 63). All of his service as a Foreign Service Officer between 1935 and 1945 was in China. He was rated by Ambassador Gauss, the last Ambassador under whom he served in China, as "one of the ablest and most promising young officers of the China corps and the service in general."[3] From 1943 to 1945 he was assigned to duty as a political reporter with the United States Army in China and in 1944 and 1945 was sent as an observer for the Army to Chinese Communist Army headquarters in Yenan.[4] The Loyalty Security Board of the Department of State found petitioner's reports to be "objective, and extraordinarily accurate as political forecasts of what was to come" (R. 16). It was a part of petitioner's duties while assigned to the Army to supply background material to American newspapermen in China, including, in his discretion, material from his own reports.[5]

In April 1945, on termination of his Army assignment and shortly after his return to the United States, petitioner lent a few of his personal copies of his reports to one Philip Jaffe, editor of Amerasia magazine; those selected by Service, according to the State Department Loyalty Security Board, "contained nothing that could be considered harmful to the national security" (R. 25). Jaffe at the time was under close surveillance by the F. B. I. (R. 21). In June

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[2] The transcript of the hearing before the Department of State Loyalty Security Board is printed in the Hearings before a Subcommittee of the Committee on Foreign Relations, United States Senate, 81st Cong., 2d Sess., pursuant to S. Res. 231, pp. 1958-2509, hereinafter referred to as the "Tydings Committee Hearings."

[3] Tydings Committee Hearings, p. 2067.

[4] Tydings Committee Hearings, pp. 1962-1974.

[5] *Ibid.*, pp. 2005-2006, 2095-2098; R. 24.

1945 petitioner, Jaffe; and four others were arrested by the F. B. I. on warrants charging conspiracy to violate the Espionage Act. Petitioner appeared and testified before a federal grand jury in August 1945, and the jury thereafter voted unanimously not to indict him.[6]

From the time of his arrest, petitioner had been on leave of absence with pay. When the grand jury found no basis for an indictment against him, Secretary of State Byrnes, acting on the recommendation of the Foreign Service Personnel Board, on August 14, 1945, restored him to active duty; he predicted "a continuance of the splendid record I am advised you have maintained since first you entered the Foreign Service", while Under Secretary Grew on the same day wrote his pleasure that petitioner was returning to Far Eastern duty "where you have established an enviable record for integrity and ability."[7] In May 1948 petitioner was promoted to Class 2 in the Foreign Service.[8]

The Department of State reviewed petitioner's case a number of times over the next five years, and cleared him in 1945, 1946, 1947 and 1949.[9] In early 1950 the favorable decision of the Department Loyalty Security Board in 1949 was under "post-audit" review by the Loyalty Review Board (R. 1, 33). On January 5 and February 20, 1950, petitioner was attacked on the Senate floor.[10] On March , 1950, a panel of the Loyalty Review Board acting on "post-audit" recommended that petitioner's case be "remanded" to the Department. The accusing Senator so advised the Tydings Committee on the morning of March 14, 1950.[11] By letter dated March 14, 1950, the Loyalty Review Board

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[6] *Ibid.*, pp. 2234-2237, 2290, 2347.

[7] Tydings Committee Hearings, pp. 2347-2348.

[8] *Ibid.*, p. 2385.

[9] Testimony in February 1949 before House Sub-Committee on Appropriations, Hearings, 81st Cong., 1st Sess., p. 298.

[10] Tydings Committee Hearings, p. 1902; 96 Cong. Rec. 1956.

[11] *Ibid.*, p. 131.

directed the Department of State Loyalty Security Board to reconsider petitioner's case and to hold a hearing on charges (R. 12). On March 16, 1950, petitioner, who was then aboard ship en route to his assignment as Officer in Charge at Calcutta, was directed to return to Washington.[12]

On March 24, 1950, the Chairman of the Department of State Loyalty Security Board sent to petitioner a letter of charges. This letter (R. 28) referred to the 1950 McCarran Rider, authorizing the Secretary of State "in his absolute discretion" to discharge any employee in the Department "whenever he shall deem such termination necessary or advisable in the interests of the United States," to Executive Order 9835, and to the Department's Regulations and Procedures of March 11, 1949, relating to Loyalty and Security of Employees, a copy of which was enclosed. The letter stated that the charges were based on Sections 392.2(f) [suspect associations as evidence of disloyalty] and 393.1(d) [suspect associations as evidence of security risk] of said Regulations and Procedures. It advised that a hearing would be held on these charges to determine whether petitioner's employment should be terminated in the interests of the United States.

After 15 days of hearings, the Loyalty Security Board on October 24, 1950, found (a) that petitioner was neither disloyal nor insubordinate in his relations to former Ambassador Hurley; and (b) that, although petitioner had been indiscreet in lending his reports to Jaffe, the circumstances of these disclosures contained no evidence of disloyalty, and that the experience suffered by petitioner as a consequence of this indiscretion "has served to make him far more than normally security conscious." Accordingly, the Board concluded (1) that reasonable grounds did not exist for the belief that petitioner was disloyal to the United

[12] *Ibid.*, p. 1905.

States and (2) that petitioner did not constitute a security risk (R. 14-28). These findings and conclusions of the Loyalty Security Board were approved by the Deputy Under Secretary of State (Administration) pursuant to authority delegated to him by the Secertary of State (R. 42-43, 63).

The Loyalty Review Board, again acting by way of "post-audit," returned the case to the Department of State (R. 33). Executive Order 10241 was issued on April 28, 1951, to amend the loyalty standard previously established by Executive Order 9835. The departmental Loyalty Security Board again considered petitioner's case, under the new and stricter standard, and on July 31, 1951, determined that "no reasonable doubt exists as to his loyalty to the United States" (R. 42, 63). These findings and conclusions of the Loyalty Security Board were also approved by the Deputy Under Secretary of State (Administration) (R. 42-43, 63).

By letter of October 11, 1951 (R. 78) the Loyalty Review Board of the Civil Service Commission advised petitioner that it had again conducted a "post-audit" of his case pursuant to Regulation 14 of the Loyalty Review Board,[13] and had determined that the Loyalty Review Board would itself conduct a new hearing "upon the charges heretofore issued to you by the Department of State Loyalty Security Board." A hearing was held before a panel of the Loyalty Review Board on November 8, 1951. Since the Loyalty Review Board admittedly had no jurisdiction over matters of security, this hearing was confined to the question of petitioner's loyalty. In addition to interrogating petitioner about the lending of his reports to Jaffe, the Review Board panel had before it, but would not allow petitioner to see,

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[13] Regulation 14 as it then read (13 Fed. Reg. 255, as amended 13 Fed. Reg. 9366) is set out in the Board's letter (R. 78-79). It was later amended (17 Fed. Reg. 631) to read as set out in *Peters* v. *Hobby*, 349 U.S. 331, 341, 342 (1955).

summaries or digests supplied by the F.B.I. of recordings made by the F.B.I. of conversations between petitioner and Jaffe (R. 68-69, 74).

Subsequent to this hearing, petitioner's attorney and the Chairman of the Loyalty Review Board entered into a stipulation to the effect that evidence had been taken at the hearing before the Loyalty Review Board on the issue as to whether petitioner had disclosed information of a confidential or non-public character within the meaning of paragraph d of paragraph 2a of Part V, "Standards," of Executive Order 9835, as amended; that, since the letter of charges given petitioner had not stated specifications as to the intentional or unauthorized disclosure by petitioner of information of a confidential or non-public character, in order to avoid returning the case to the Department of State for an amendment of the letter of charges, it was agreed that the Loyalty Review Board might make a determination as if the original letter of charges had contained such a charge (R. 32).

The stipulation between the Chairman of the Loyalty Review Board and petitioner's attorney further provided:

> . . . that the case before this Board shall be considered as if the Department of State Loyalty-Security Board had made a determination that no reasonable doubt of Service's loyalty exists when the facts are considered in relation to said section 393.2d and that the foregoing stipulation shall not be deemed to alter or affect in any way the significance properly attributable to the failure of the Department of State in fact to lay a charge of disloyalty under said section 392.2d and its determination instead to lay a security risk charge under section 393.1a of its regulations..

Section 393.1a of the regulations and procedures of the Department of State refer to the 1949 regulations and proce-

dures. The 1951 Department of State Regulations and Procedures relating to Loyalty and Security of Employees contains a similar section, numbered, however, Section 393.2.[14]

On December 12, 1951, the Loyalty Review Board panel issued an opinion finding (a) that there was no evidence of communist affiliations, but (b) that petitioner had lent some of his reports to Jaffe and in his conversations with Jaffe had disclosed other information which the Board considered confidential; from this it concluded that there was a reasonable doubt as to petitioner's loyalty, and directed that the favorable finding of the departmental Loyalty Security Board be "reversed" (R. 1-11).

On December 13, 1951, the Chairman of the Loyalty Review Board directed a letter to the Secretary of State transmitting the opinion of the panel, reciting the Loyalty Review Board's "opinion" that petitioner should forthwith be removed from service, and concluding: "Please advise the Loyalty Review Board of the effective date of the removal of said employee, John Stewart Service" (R. 33-35). On the same day, petitioner's attorney was advised by letter from the Chairman of the Loyalty Review Board that the Board had "reversed" the finding of the departmental Loyalty Security Board (R. 80). Petitioner and his attorney immediately sought and at about 6:00 P.M. that same day obtained an interview with the Deputy Under Secretary of State (Administration). Petitioner requested that any action be withheld at least for twenty-four hours until he could address an appeal to the Secretary of State or a request for reconsideration to the Loyalty Review Board. The Deputy Under Secretary declined to withhold immediate action, stating that the determination to separate petitioner from the Foreign Service had already been reached,

[14] Appendix A, *infra*, p. 77.

that the decision of the Loyalty Review Board was binding on the State Department, and that members of the press had been notified some two hours earlier that a public statement was about to be issued on the case (R. 72). This notice was given the press within four hours after receipt of the Loyalty Review Board opinion within the Department (R. 50, 66, 72). At the same time the Deputy Under Secretary gave petitioner a copy of a press release, which was issued by the Secretary of State later on December 13. That press release (R. 35-37) said in part:

> The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. Those Regulations are binding on the Department of State.
>
> The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated.

At this time the Regulations of the Loyalty Review Board (13 Fed. Reg. 9372, 5 CFR Section 220.4(d)) provided: "It is necessary that the head of an agency follow the recommendation of the Loyalty Review Board in all cases." The 1949 Department of State Regulations and Procedures relating to Loyalty and Security of Employees provided in Section 391.2 that the Regulations of the Loyalty Review Board "constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State." They also provided in Section 396.4: "If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of

State that the officer or employee should be removed from employment under the loyalty standard referred to in Sec. 392, the Department will take prompt administrative action to remove him from employment." The revised Department Regulations and Procedures of 1951, which have never been published and of which petitioner was unaware until this proceeding reached the courts, contain the same provision with slight modification.[15]

On December 14, 1951, petitioner received a letter from the Deputy Under Secretary (Administration), dated December 13, advising him that the Loyalty Review Board had found, as a consequence of his unauthorized disclosure of documents and information, that there was a reasonable doubt as to his loyalty, and that pursuant to that finding his employment was terminated as of the close of business December 14, 1951, "under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress" [the then-current McCarran Rider] (R. 75). The Department's Notice of Personnel Action, dated December 17, 1951, states that the terminating action was taken "pursuant to the decision of the Loyalty Review Board," and cites as "termination authority" Executive Order 9835 and the McCarran Rider (R. 84). Petitioner thereafter sought clarification of the reason for termination of his services and on December 27, 1951, was advised by letter from the Deputy Under Secretary "that your employment was terminated solely as a result of the aforementioned finding of the Loyalty Review Board" (R. 76).

Petitioner after vain efforts to obtain reconsideration by the Loyalty Review Board and the Civil Service Commis-

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[15] Section 396.4 of the 1951 regulations is made applicable to adverse loyalty determinations by the Loyalty Review Board "on appeal." But neither the 1949 nor the 1951 regulations of the Department of State make any express provision for disposition of cases following the Review Board's unlawful "post-audit."

sion [16] instituted the present action. His third amended complaint asked for a declaratory judgment that his separation from service was invalid, that all defendants be directed to expunge fom their records all written statements reflecting that petitioner's employment had been terminated on the ground that there was a reasonable doubt as to his loyalty to the United States, and that the Secretary of State be directed to reinstate petitioner to his employment and former grade in the Foreign Service with full restoration of property rights and payment of accumulated salary (R. 59-61). Following the Government's answer, both parties filed motions for summary judgment (R. 70; 80). To the Government's motion was attached the affidavit of the former Secretary of State (R. 81); it was dated January 19, 1953, and said in material part:

> 3. On that same day [December 13, 1951] I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.
>
> 4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Sec-

[16] The complaint alleges and the answer admits that petitioner "has in every respect exhausted every administrative remedy available to him" (R. 51, 66). The motion to vacate and reconsider was filed with the Loyalty Review Board on December 20 and denied on January 7, 1952; it urged the Board's lack of authority to reverse a favorable Departmental decision. Exs. J and K to complaint. The request for review by the Civil Service Commission was filed January 7 and denied April 1, 1952 (R. 38).

tion 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before these boards there was a reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment.

6. Attached to this affidavit * * * are copies of Notice of Personnel Action * * * which correctly reflect the action taken to terminate Mr. Service's employment.

On the day before this case was argued in the District Court, this Court in *Peters* v. *Hobby*, 349 U.S. 331, held in-

valid Regulation 14 of the Loyalty Review Board, a decision of a panel of the Board thereunder following a "post-audit" hearing, and a decision of a department head based on the Review Board's decision, on the ground that the reviewing authority of the Loyalty Review Board was confined by Executive Order 9835 to cases of "persons recommended for dismissal on grounds relating to loyalty by the Loyalty Board of any Department or Agency."

On authority of the *Peters* case, the District Court declared the action of the Loyalty Review Board a "nullity" and directed the Civil Service Commission to expunge from its records the Board's finding that there was a reasonable doubt as to petitioner's loyalty. But with respect to the other relief sought by petitioner, the District Court granted summary judgment for respondents (R. 89). The Court of Appeals affirmed (R. 92).

Summary of Argument

I

A. The Loyalty Review Board acted without jurisdiction when after a favorable determination of the petitioner's case by the Department of State Loyalty Security Board, it held a hearing on the case, and found that there was a reasonable doubt as to petitioner's loyalty to the United States. The petitioner could not lawfully be discharged on the basis of findings and an opinion of the Loyalty Review Board entered without jurisdiction. *Peters* v. *Hobby*, 349 U.S. 331, 345.

B. The Loyalty Review Board not only acted outside its jurisdiction but the procedures which it followed in petitioner's case violated the Fifth Amendment and Executive Order 9835. The Board based its decision chiefly on the summaries or digests of four intercepted conversations between petitioner and Jaffe. It denied the petitioner any information either as to the recordings or as to the contents

of the summaries or digests. Not even the Board was supplied by the FBI with the recordings or exact transcriptions thereof. Both the petitioner and the public knew considerably before the hearing conducted by the Loyalty Review Board in petitioner's case that the FBI had made recordings of conversations between petitioner and Jaffe.

At least when there are no considerations of national security with which to contend, it has been consistently held that, in a quasi-judicial or adversary administrative hearing evidence, which, either in whole or in part, forms the basis of the agency's decision cannot be withheld from one of the parties to the proceeding. *Ohio Bell Telephone Company* v. *Public Utilities Comm.*, 301 U.S. 292, 300-305. *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed without opinion by an equally divided court, 341 U.S. 918, does not require or suggest a different conclusion.. There is no confidential informant involved in the instant case. In no conceivable circumstances, therefore, could the investigative process or the national security be imperiled if petitioner were advised of what he was supposed to have said or heard in his conversations with Jaffe. An analogy in support of petitioner's contention that he should have been furnished the secret evidence on which the Board relied in reaching its decision is found in cases arising under the Selective Service Act in which this Court has held that an administrative decision may not be based on evidence of which at least a fair resume has not been given to the party affected. *Simmons* v. *U. S.* 348 U.S. 397; *Gonzales* v. *U. S.*, 348 U.S. 407.

In addition to offending due process the Loyalty Review Board's reliance on secret evidence violated Executive Order 9835. The provisions of that Order show that it "does not contemplate arbitrary secrecy", *Jay* v. *Boyd*, 351 U.S. 345, 358, such as indulged in by the Loyalty Review Board in this case.

C. The contemporary evidence was unmistakable that

petitioner was discharged in automatic consequence of the unlawful action of the Loyalty Review Board. The Board at the time was of the view that the Secretary of State was required to remove petitioner as a consequence of its decision. Its regulations so provided, as did those of the Department of State. The Deputy Under-Secretary advised the petitioner that his removal was "required" as a result of the Board's action. The affidavit filed in this litigation by the former Secretary of State who discharged the petitioner is both clear and candid on this point. His determination to discharge petitioner was made "solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of the Board." Executive discretion which is based upon unlawful grounds is an abuse of discretion, and under decisions of this Court it may not stand. *Perkins* v. *Elg*, 307 U.S. 325, 349-350; *Securities Comm'n.* v. *Chenery*, 318 U. S. 80, 95; *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123.

II

A. The petitioner was charged and tried as a loyalty and security risk and ultimately removed on loyalty grounds only. Throughout the proceedings the Department's underlying authority was based upon Executive Order 9835 and the McCarran Rider. Since the petitioner was a Foreign Service Officer and, as a consequence, entitled to procedural protections provided by the Foreign Service Act of 1946, it was necessary for the Department to rest its substantive authority in bringing dismissal proceedings against petitioner on the McCarran Rider. Executive Order 9835, of itself, did not vest any additional substantive legal authority in the heads of administrative agencies to discharge an employee.

While the McCarran Rider itself required no procedural

safeguards, the Department's 1949 regulations provided that in executing its responsibilities under that statute its employees would be afforded the same protections as those provided under the Loyalty Program. There can be no doubt that the petitioner was proceeded against under the 1949 regulations of the Department. The original letter of charges was based on those regulations. The Deputy Under-Secretary three times reviewed decisions of the Department of State Loyalty Security Board pursuant to the 1949 regulations. A charge, added by stipulation between petitioner's counsel and the Loyalty Review Board, following a hearing before a panel of that Board, was based on the 1949 regulations.

The 1949 regulations were violated in three respects by petitioner's removal. Contrary to the regulations, the case was re-opened after favorable decisions of the Loyalty Security Board had three times been reviewed and approved by the Deputy Under-Secretary. Secondly, petitioner's timely request for an appeal to and a hearing before the Secretary, as provided by the 1949 regulations, was denied. Finally, as the Secretary's affidavit admits, his decision was not based on the "evidence" in the record, as required by the regulations.

B. There is no case authority to support the Government's startling contention that the Department can initiate, prosecute and conclude a loyalty proceeding against petitioner on the basis of the 1949 regulations and then support the result reached in those proceedings by a later set of regulations, issued in 1951 but which were not published, and of which the petitioner had no notice, and of whose alleged applicability to his case he was not advised until this litigation had reached the District Court. To sustain such a claim would be to go far beyond the limits of any retroactive application of administrative rules which

the courts have tolerated in the past. In the analogous field of criminal procedure, it is a well-accepted principle that laws which effect retroactive charges with respect to substantial procedural rights are unconstitutional because *ex post facto* in nature. *Beazell* v. *State of Ohio*, 269 U.S. 167, 170. See also *Peters* v. *Hobby*, 349 U.S. 331, 344.

The Government's contention that the 1951 regulations applied to petitioner's case is not only distastefully technical, it is also wrong. Section 5(a) of the Federal Register Act requires publication in the Federal Register of "every document or order [of Federal agencies] which shall prescribe a penalty . . ." While there has been no authoritative construction of Section 5(a), it would appear that the Department's 1951 loyalty-security regulations, which prescribe the grave penalty of dismissal from the Government service are of a class covered by the statute. Since the regulations were not published and the petitioner was not given personal notice of them, they cannot apply to his case. *Federal Broadcast System, Inc.* v. *F. C. C.*, 225 F. 2d 560, 568; certiorari denied, 350 U.S. 923; *Hotch* v. *United States*, 212 F. 2d 280, 283 (C.A. 9).

Moreover, even if applicable the 1951 regulations would not alter the result since they too were violated in two respects by the Secretary's dismissal of petitioner. Those regulations required that decisions by the Secretary "shall be reached after consideration of the complete file, arguments, briefs and testimony presented." Quite obviously this requirement is not met by reading an unlawful opinion of the Loyalty Review Board. *Morgan* v. *United States*, 298 U.S. 468, 481; *Kutcher* v. *Gray*, 199 F. 2d 783. In addition, the right of appeal to the Secretary, provided by the 1951 regulations, was denied petitioner.

C. This case is governed by the well-established doctrine

that when a Government official or agency lawfully prescribes rules of procedure they are binding on the Government as well as the citizen. *Bridges* v. *Wixon*, 326 U.S. 135, 153. The principle holds even when the action taken by an administrative official in violation of his own rule is discretionary in nature. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 267.

D. The courts below rested their decision upon the unsupported assertion that it was not the intent of Congress that the Secretary of State should bind himself to follow provisions of Executive Order 9835 in dismissing employees under the authority vested in him by the McCarran Rider. The contrary is true. The State Department reported to the Senate that in carrying out its responsibilities under the McCarran Rider it took the view that that statute was subject to procedural limitations and, as a consequence, applied the same procedures which it followed in carrying out its responsibilities under Executive Order 9835. The report of the Tydings Committee received unprecedented attention from the Congress. This case, more than any in the books, is governed by the rule that when Congress re-enacts a statute with knowledge of the administrative construction which has been given it, that construction must be deemed to have been ratified by the Congress. *Labor Board* v. *Gullet Gin Company*, 340 U.S. 361, 366; *Fleming* v. *Mohawk*, 331 U.S. 111, 116.

If more was needed to contradict the assertion of the court below the Congress did not intend that the Secretary of State should bind himself to follow the provisions of Executive Order 9835 in exercising the authority vested in him by the McCarran Rider, it is provided by the Act of August 26, 1950 which replaced the McCarran Rider and provided procedures which very clearly correspond with those of Executive Order 9835. *Cole* v. *Young*, 351 U.S. 536.

ARGUMENT

The Court of Appeals held: (a) that action of the Loyalty Review Board, undertaken without jurisdiction and grounded upon tainted evidence, can supply the sole basis for the lawful exercise of discretion by the Secretary of State, and (b) that the Secretary is free completely to disregard his own procedural regulations and the Department of State's representations to the petitioner as to the manner in which his discretion is to be exercised. Each holding is wrong.

I

The Secretary's Discretionary Action Rested on Invalid Grounds

We show in this section of the brief that the Loyalty Review Board acted without jurisdiction and, furthermore, based its decision on evidence withheld from petitioner in violation of the Fifth Amendment and the Executive Order under which the Board purported to act. The Secretary of State based his decision to discharge petitioner solely on the findings and the opinion of the Loyalty Review Board that were lawless. His decision, accordingly, was invalid.

A. *The Loyalty Review Board Acted Without Jurisdiction.*

It is indisputable that the petitioner could not lawfully be discharged on the basis of the findings and the opinion of the Loyalty Review Board. These were entered following a "post-audit" of the petitioner's case by the Board and a hearing before it, both conducted on the Board's own motion, after a favorable decision by the Department of State. This conduct of the Board was "administrative lawlessness." *Peters* v. *Hobby*, 349 U. S. 331, 345.[17] It is

[17] The suggestion in *Peters* (p. 345) was that the President might have withheld post-audit jurisdiction from the Loyalty Review Board so that

beyond contest that the Loyalty Review Board acted outside its jurisdiction when it reopened petitioner's case and made the findings and announced the opinion on the sole basis of which the Secretary of State purported to act in discharging petitioner.

B. *The Loyalty Review Board's Procedures Violated the Fifth Amendment and the Executive Order*

The Loyalty Review Board not only acted beyond its jurisdiction but the procedures which it followed in petitioner's case violated, in a critical respect, the due process clause of the Fifth Amendment and the provisions of Executive Order 9835 (Appendix A, infra, pp. 51-52). Except for plaintiff's own testimony, the only evidence relied upon by the Loyalty Review Board in reaching its decision consisted of certain purported digests or summaries of conversations between the plaintiff and Jaffe at the latter's hotel room in Washington on April 19 and 20, 1945, and on May 8 and 29, 1945 (R. 49, 65). Agents of the Federal Bureau of Investigation, through recording devices, made records of these conversations between petitioner and Jaffe (R. 68-69, 74). Neither the recordings themselves nor any exact transcription of them were made available to the Loyalty Review Board or to the petitioner (R. 68-69). Purported digests and summaries of the conversations, however, were

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the employee would be "assured that his fate would not be decided by political appointees who perhaps might be more vulnerable to the pressures of heated public opinion." The Loyalty Review Board here directed the Department to issue charges against petitioner shortly after petitioner had been denounced on the Senate floor, the accusing Senator seems to have had advance knowledge of this directive (*supra*, p. 5); and a transcript of the Board's minutes of February 14, 1951, as read on the Senate floor, shows that in the period of its remand of petitioner's case to the Department of State the Board was expressing great concern that the State Department Loyalty Security Board had not recommended the discharge of enough employees; "the program simply does not work in that Department." (98 Cong. Rec. 192-193).

furnished to the Loyalty Review Board by the Federal Bureau of Investigation (R. 68-69). Petitioner's counsel requested, during the hearing before the State Department's Loyalty Security Board, that the recordings or exact transcriptions of them be made available to him, but that request was refused (Tydings Committee Hearings, p. 2457). His request of the Board that petitioner be furnished the summaries of the conversations was also denied (R. 47). The transcript of the one conversation ever made available to petitioner (in a Congressional hearing) shows on its face that it is incomplete and in a substantial part, unintelligible.[18]

Despite his counsel's timely request, petitioner was not permitted to see either recordings of the conversations between himself and Jaffe or summaries and digests thereof (R. 47). The Board was somewhat better informed: It was supplied with summaries and digests of the recorded conversations (R. 68). Recordings of the conversations, however, were not made available to the Board (R. 68). Part IV, Section 1 of Executive Order 9835 expressly directs investigating agencies, at the request of the head of any department or agency of the Executive branch, to make available to such head or his designees ". . . all investigative material and information collected by the investigative agency concerning any employee . . ." As a result of re-

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[18] Tydings Committee Hearings, p. 1404. The stenographer described one passage as "(unintelligible)", added a word in a vain effort to make one sentence intelligible, inserted his own doubts by "?", put in a reference to "Petroff (ph) the new Soviet Ambassador" when no known Soviet Ambassador to China or America has had a remotely similar name, and attributed to petitioner a quotation from an unknown "Award (ph)." He has Service relaying the astounding information (contradicted in the very conversation) that "Hurley's fighting Chungking." The Loyalty Review Board mangles this tapped conversation still further by translating "military plans" into troop dispositions when in context the "plans" related only to political recognition by the military of both Chiang Kai-Shek and the Communists.

spondents' denial (R. 65) of petitioner's allegation that these provisions were not complied with (R. 48), it is established that the Secretary of State, the Loyalty Security Board, or the Loyalty Review Board, requested the F. B. I. to make available to them the original recordings of the conversations between the petitioner and Jaffe, as well as the testimony of the persons who prepared the summaries, digests, and characterizations of these conversations. No such testimony was presented, and respondents, in reply to the request for admissions made of them by the petitioner, admitted that "no recording or exact transcript" of the conversations between petitioner and Jaffe were made available either to the Loyalty Security Board or to the Loyalty Review Board (R. 68). Despite the unavailability of the best evidence, the Loyalty Review Board rested its decision solely on the conversations between petitioner and Jaffe (R. 4, 5, 6, 8, 10, 11). The judges, in this as in other recent instances, did not have the evidence on the basis of which they presumed to judge. *Peters* v. *Hobby*, 349 U. S. 331, 350; *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 180. The Board relied on secret information despite the fact that, as respondents admit, no confidential informant was involved, either in recording the conversations or in preparing the summaries of their contents for the use of the Board (R. 68-69). Moreover, the fact that the Federal Bureau of Investigation had made recordings of conversations between petitioner and Jaffe, through the device of a microphone secretly planted in the latter's room, had been revealed not only to the petitioner but to the public sometime before the hearing conducted by the Loyalty Review Board in this case.[19]

1. *The Fifth Amendment.* There can be no conceivable

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[19] Tydings Committee Hearings, pp. 1404, 1915-1916. The Tydings Report was published and made available to the public in July 1950.

reason of security why an accused cannot know and explain what he is supposed to have said. Every reason of rudimentary fairness requires that this purported evidence should have been made available to petitioner. Reliance on this type of secret evidence by the Loyalty Review Board violated both the Fifth Amendment and the Executive Order under which the Board purported to act.

At least when there are no considerations of national security with which to contend, it has been consistently held, either on the grounds of due process or because of requirements of applicable statutory provisions, that in a quasi-judicial or adversary administrative hearing, evidence, which either in whole or in part, forms the basis of the agency's decision, can not be withheld from one of the parties to the proceedings. *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U.S. 292, 300-05; *United States* v. *Abilene and Southern Ry.*, 265 U.S. 274, 289. In such a hearing the parties "must be cognizant of all the facts before the Board * * *." *Gonzales* v. *United States*, 348 U.S. 407, 413. Manifestly, "there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute * * *." *I.C.C.* v. *Louisville & Nashville R. R. Co.*, 227 U.S. 88, 93. "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *West Ohio Gas Co.* v. *Public Utilities Comm.*, 294 U.S. 63, 69. These principles of law are elemental. They should apply here unless perhaps some countervailing considerations of national security outweigh them. We are able to perceive no such counterweight among the facts of this case, nor have the respondents suggested any.

Bailey v. *Richardson*, 182 F. 2d 46, affirmed without opinion by an equally divided court, 341 U. S. 918, does not require or suggest a different conclusion. There,

the Court of Appeals held that a probationary federal employee could be dismissed on the basis that reasonable grounds existed to indicate that she was disloyal to the Government of the United States following a proceeding before a Regional Loyalty Board in which derogatory information concerning the employee which had been supplied by confidential informants was not made available to her. Whatever may be the force of the reasons for preserving the ambiguity of these "confidential informants," they are inapplicable here. In no conceivable circumstances could the investigative process or the national security be imperiled if petitioner Service were advised of what room-tapped Service was supposed to have said or heard.

Bailey v. *Richardson* contains also strong indications that the Court of Appeals considered the Fifth Amendment inapplicable to proceedings involving the status of Government employees (182 F. 2d at 58-59), at least at times when the "cold war" was raging (182 F. 2d at 51). These principles can no longer, if ever they could, be taken as receiving the support of half the Justices of this Court.

In *Peters* v. *Hobby*, 349 U.S. 331, 338, this Court recognized the delicacy of the problem of equating individual liberty and national security. 349 U.S. at 338. Other opinions of this Court, subsequent to *Bailey* v. *Richardson*, *supra*, indicate that, in view of the stigma which attaches to persons who are dismissed on loyalty or security grounds, in such cases "the need for procedural safeguards seem even greater than in other cases, . . ." *Cole* v. *Young*, 351 U.S. 536, 546. See also, *Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 139, 143, 161; *Shaughnessey* v. *Mezei*, 345 U.S. 206, 224-227. This Court has held that due process does extend to protect public servants whose exclusion or dismissal from public employment "is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 344 U.S.

183, 192. Whatever may be the ultimate decision as to the anonymity of "confidential informants" this case presents no such vexing problem. The Loyalty Review Board based its findings and opinion against the petitioner on secret evidence as to which there is no conceivable justification for the secrecy.

An analogy is found in the cases arising under the Selective Service Act. In *United States* v. *Nugent*, 346 U.S. 1, the Court held that a person whose claim for exemption from the draft as a conscientious objector had been denied following a hearing before the Department of Justice in which he had been informed with respect to the general nature and character of the secret unfavorable evidence which had been developed by the Government's investigation, was not deprived of due process. This Court, however, did caution that the registrant was entitled to a "fair resume of any adverse evidence in the investigator's report." 346 U.S. at 6. Subsequently, in *Simmons* v. *United States*, 348 U.S. 397, the Court held that the failure of the Department of Justice to furnish the petitioner, a member of Jehovah's Witnesses who sought exemption as a conscientious objector, with a fair resume of all adverse information in the F. B. I.'s report, deprived him of a "hearing" within the meaning of Section 6j of the Selective Service Act of 1948.[20] See also *Gonzales* v. *United States*, 348 U.S. 407.

The Selective Service cases were decided under the statute rather than on the ground of due process. Yet, as the Court observed in *Simmons* v. *United States, supra*, the failure to furnish petitioner a fair resume of secret derogatory information found in the Government's file deprived him of a "fair hearing" within the meaning of the Selective

[20] 62 Stat. 604, 613, 50 U.S.C. 456(j) as amended 65 Stat. 75, 86, 50 U.S.C. App. (Supp. V) Sec. 456(j).

Service Act, which right, the Court felt, was a "fundamental safeguard." 348 U.S. at 406.

The Court of Appeals for the 9th Circuit recently held, in a case in which the Government did not seek certiorari, *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9), that security regulations enforced by the Coast Guard under the Magnuson Act operated to deny complaining seamen of due process where the seamen were denied security clearance for service on merchant vessels on the basis of confidential information which was not revealed to them in hearings held before a Coast Guard security board. The court balanced out in the seamen's favor the "danger or possible danger to national security" and the "ancient and generally accepted rights of notice and hearing envisioned by the Fifth Amendment." 227 F. 2d 717. The *Parker* result applies *a fortiori* here, where no confidential informants are involved.

2. *The Executive Order.* Apart from the Constitutional infirmity which attaches to its action, the Loyalty Review Board's reliance on secret evidence in this case violates the Executive Order which created the Board and from which it receives its authority. Executive Order 9835 provides in Part II, Section 2, a., that an officer or employee charged with disloyalty "shall have a right to an administrative hearing. * * *" In Part II, Section 2, b., it is required that the accused employee or officer

> shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and as completely as, in the discretion of the employing department or agency, security considerations permit * * *

Part IV, Section 2, of the Executive Order permits the investigative agency to withhold the names of confidential

informants under certain circumstances but forbids the names of such informants to be withheld "where such action is not essential." Part IV, Section 1, of the Executive Order expressly directs investigative agencies at the request of any department or agency of the executive branch to make available to such head or his designees "* * * all investigative material and information collected by the investigative agency concerning any employee * * *."

These provisions of Executive Order 9835, in our view, demonstrate the obvious; the Executive Order "does not contemplate arbitrary secrecy" *Jay* v. *Boyd*, 351 U.S. 345, 358. Administrative reliance on secret evidence, may possibly be justified when national security interests require and the disclosure of such information would be prejudicial to the public interest. *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Shaughnessy* v. *Mezei*, 345 U.S. 206; *Jay* v. *Boyd*, *supra*. Petitioner has already shown, *supra*, pp. 24-26, that there are no such considerations present in the instant case. No confidential informants are involved. There is no legitimate national purpose to be served in refusing the petitioner the right to have access, either to the recordings of the conversations between himself and Jaffe, or to the summaries of those conversations. Respondents requested the F. B. I. to make available the critically important recordings of the conversations, but their request was refused. They were thus required to judge, as petitioners were required to litigate, in the dark. A construction of the Executive Order to permit secrecy for the sake of secrecy alone would be inconsistent with the "traditions and principles of free government," *Jay* v. *Boyd*, *supra* at 357, and convert the "administrative hearing" provided by it into a meaningless form from which even the most elementary canons of fair play had been removed.

C. *The Secretary Relied Solely Upon the Lawless Findings and Opinion of the Loyalty Review Board, and His Action Should be Reversed*

The contemporaneous evidence was unmistakable that petitioner was discharged in automatic consequence of the unlawful action of the Loyalty Review Board. That Board said that it "reversed" the departmental Board; it requested of the Secretary advice "of the effective date of removal of said employee;" its regulations provided "It is necessary that the head of an agency follow the recommendations of the Loyalty Review Board in all cases;" the Department's own regulation advised that upon adverse decision of the Loyalty Review Board "the Department will take prompt administrative action to remove" the employee; its Deputy Under Secretary advised petitioner orally that under the Loyalty Review Board action the Department was "required" to remove petitioner and by letter that "Your employment was terminated solely as a result of the above mentioned finding of the Loyalty Review Board;" the Secretary's press release said, the Loyalty Review Board regulations "are binding on the Department;" and the formal personnel action, said by the Secretary in his affidavit to be correct, described petitioner's removal as "pursuant to the decision of the Loyalty Review Board" (*supra*, pp. 9-11).

It developed only when the former Secretary's affidavit was filed in this action, some 14 months later, that he himself had in this respect a sounder knowledge of his responsibilities than did his Department. That affidavit explains that he recognized at the time that the responsibility of decision was vested in him and that he was not legally bound by the opinion of the Loyalty Review Board [21]

[21] The Court of Appeals for the District of Columbia so held on October 16, 1952. *Kutcher* v. *Gray*, 199 F. 2d 783.

(*supra*, pp. 12-13). The respondents, however, are not aided, for the former Secretary with commendable candor goes on to say—

> 5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was a reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board.

In *Peters*, the majority of this Court assumed that the Secretary acted on the basis of the unlawful opinion of the Loyalty Review Board (349 U.S. at 337, 348); the dissenting Justices found nothing to show that this opinion was treated by the Secretary as anything more than a recommendation (349 U.S. at 356). Here there is no such ambiguity. The Court in this case, as it did not in *Peters*, has the Secretary's affidavit that he considered himself free to disregard the Loyalty Review Board decision. But it also knows from that affidavit, as it did not in *Peters*, that the Secretary based his action *solely* on that unlawful decision. His affidavit makes it plain that, had he known the decision of the Loyalty Review Board to be a nullity, he would have had nothing at all to support his removal of

petitioner; this is most simply tested by reading paragraph 5 of the affidavit with the descriptive word "invalid" or "unlawful" inserted before each reference to the finding or opinion of the Loyalty Review Board.

If we put aside the Secretary's violation of his procedural regulations (*infra*, p. 45), the case is this: The Secretary took discretionary action but based it solely upon findings and an opinion of the Loyalty Review Board which represented a lawless assumption of jurisdiction and rested in chief part upon an unlawful use of secret and grossly unreliable evidence.

Executive discretion which is based solely upon unlawful considerations is an abuse of discretion, and should under the decisions of this Court have been set aside by the courts below. In *Perkins* v. *Elg*, 307 U.S. 325, 349-350, the Court directed that mandamus issue to the Secretary of State to reconsider his discretionary denial of a passport because it had been based upon an error of law as to the applicant's citizenship.[22] In *Securities Comm'n.* v. *Chenery Corporation*, 318 U.S. 80, 95, the Court held that, while the "exercise of administrative discretion" need not be justified "in any particular manner or with artistic refinement," it "cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." In *Accardi* v. *Shaughnessy*, 347 U.S. 260, the Court reversed a denial of habeas corpus to an alien whose deportation the Board of Immigration Appeals refused to suspend; the Board's decision was wholly discretionary but was taken in the light of the Attorney General's listing of the alien as an "unsavory

[22] The Court of Appeals for the District of Columbia, following the decisions in *Perkins* v. *Elg* and *S.E.C.* v. *Chenery*, *supra*, has ruled on several recent occasions that the Secretary of State cannot base a discretionary denial of a passport upon invalid evidence or procedure. *Schachtman* v. *Dulles*, 225 F. 2d 938, 943; *Boudin* v. *Dulles*, 235 F. 2d 532; *Kraus* v. *Dulles*, 235 F. 2d 840.

character" who should be deported. *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, held that the Attorney General may not arbitrarily and without a hearing list an organization as subversive, even though the listing is merely a step in procedures looking to discretionary discharge.

In *Perkins* v. *Elg*, *supra*, this Court refused to approve the exercise of the Secretary of State's discretion with respect to the issue of a passport which was based "solely" upon an error of law as to the applicant's citizenship. Similarly, the Court should set aside the discretionary action of the Secretary of State in discharging petitioner "solely" on the basis of lawless findings and opinion of the Loyalty Review Board. The *Elg* doctrine we believe comes down to this: Discretionary action which is based upon unlawful grounds is not in exercise of the discretion which the Congress committed to the official. Here, the former Secretary "did not make any independent determination of my own * * *. I made no independent judgment on the record in this case." He acted, instead, "solely as a result of the findings of the Loyalty Review Board," and "deemed it appropriate and advisable to act on the basis of" those findings. Had the former Secretary then known the Loyalty Review Board findings to be a nullity he could not possibly have "deemed it appropriate and advisable" to carry them into effect; he would in that case surely have found something "which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it." The evidence is indisputable that when the Secretary exercised his discretionary authority to discharge petitioner, he did so under the assumption that the finding and opinion of the Loyalty Review Board, on which he "solely" based the exercise of that discretion, were lawful. As he stated in his affidavit: "There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise

of my responsibilities as Secretary of State to act on it." Accordingly, the Secretary "deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board." (R. 82.) The press release which the Department of State put out when it announced petitioner's dismissal also makes it plain that the Secretary in taking that action did so on the assumption that the finding and opinion of the Loyalty Review Board were lawful (R. 35). That assumption is now conceded to have been erroneous. Equally erroneous is the Secretary's decision to dismiss petitioner solely in reliance on it. We may assume that acceptance of valid findings of another agency can with charity be called the exercise of his own discretion by the Secretary, but if he relies solely upon unlawful and invalid findings there has been no lawful exercise of discretion.

II

The Secretary in Discharging Petitioner Violated His Own Regulations

We show in this part a second and independent ground requiring reversal of the decision below. Validly promulgated administrative regulations, whether procedural or substantive, have the force and effect of law. They bind the administrator who issues them equally with others to whom they apply. The Secretary of State, as we show below, violated his own procedural regulations in discharging the petitioner. That dismissal, accordingly, is invalid.

A. *The 1949 Regulations of the Department*

1. *The Proceedings Were Under the 1949 Regulations.* The petitioner was charged and tried as a loyalty and security risk and ultimately removed on loyalty grounds only. Throughout the proceedings the Department's underlying authority was based upon (a) Executive Order

No. 9835 which as amended by Executive Order 10241 authorizes removal for "a reasonable doubt as to the loyalty of the person"; and (b) the McCarran Rider which authorized the Secretary "in his absolute discretion" to "terminate any employment" (including expressly employees of the Foreign Service), whenever he shall deem such termination necessary or advisable in the interests of the United States."

It was necessary for the Department to rest its substantive authority in bringing proceedings against petitioner, and ultimately dismissing him, on the McCarran Rider as well as the Executive Order. Petitioner was a Foreign Service Officer of the United States. As such, he was entitled to the protection of the Foreign Service Act of 1946, as amended.[23] That statute authorizes the Secretary of State to separate officers from the Foreign Service "for unsatisfactory performance of duty" (22 U.S.C. Sec. 1007) and "for misconduct or malfeasance" (22 U.S.C. Sec. 1008). However, both of the quoted sections require that an officer is not to be separated "until he shall have been granted a hearing by the Board of the Foreign Service." The officer's unsatisfactory performance of duty or his misconduct must be established at that hearing. Cf. *Hammond* v. *Hull*, 131 F. 2d 23, 27, certiorari denied, 318 U.S. 777. The Board of the Foreign Service is a statutory board created by Section 211 of the Foreign Service Act (22 U.S.C. Sec. 826). The petitioner never had a hearing before this Board (R. 71). Executive Order 9835 (Appendix A, *infra*, p. 52) did not vest any additional substantive legal authority in the heads of administrative agencies to discharge employees. It merely established new executive standards and procedures for effecting discharges under whatever independent legal authority existed for those

[23] 60 Stat. 999; 22 U.S.C. Secs. 826, 1007, 1008.

discharges. *Cf.*, *Cole* v. *Young*, 351 U.S. 536, 543-44. The only substantive legal authority which would permit the Secretary to dismiss petitioner without observance of the provisions of the Foreign Service Act was the McCarran Rider. Consequently, the McCarran Rider was a necessary supplement to the Department's authority if it was to proceed against petitioner under the Loyalty-Security regulations.

The Executive Order required specified procedures. The McCarran Rider itself required no procedural safeguards. But the Department's regulations, in Sec. 391.3, provided (*infra*, p. 61) that "in the exercise of this right [of discretionary discharge] the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program."[24] The formal letter of charges preferred against petitioner by the Chairman of the Department Loyalty Security Board, "for the Secretary of State," represented to petitioner in unmistakable terms that the Secretary's determination as to the necessity or advisability of petitioner's discharge "in the interests of the United States" would follow upon the Loyalty Security Board's recommendations as to whether petitioner was a security risk or of doubtful loyalty. (R.).

There can be no slightest doubt that petitioner was in fact proceeded against under the 1949 regulations of the Department.

(a) The charges were based on those regulations (R. 29).

(b) Those regulations were sent petitioner with the letter of charges (R. 29, 30).

(c) The hearing was scheduled under Section 395 of those regulations (R. 29).

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[24] By his letter of September 6, 1950 to the Secretary of State (R. 90), the President in effect directed the Secretary to exercise his absolute discretion under the McCarran rider subject to the procedural guarantees of the Act of August 26, 1950 (5 U.S.C. Sec. 22-1).

(d) The Department of State Loyalty Security Board noted that "the issues here are (1) loyalty, and (2) security risk" (R. 23).

(e) The Deputy Under Secretary, who was authorized to review this determination by Sections 395.6 and 396.7 of the 1949 regulations, on at least three occasions did so and approved the Loyalty Security Board decision (R. 33, 42-43, 63).

(f) The Loyalty Review Board post-audit, hearing and "reversal" was asserted only under the Executive Order.

(g) Finally, the stipulation entered into by the petitioner's attorney and the Chairman of the Loyalty Review Board, after evidence had been taken at the hearing before the Board, agreed upon an additional charge to be added to the Department's original charges "under section 393.1a of its regulations." (R. 32). Section 393.1a refers to the 1949 Regulations and Procedures of the Department of State (Appendix A, *infra*, p. 63).

Not until the Government's brief was filed with the District Court was there any suggestion that petitioner was removed only under the McCarran rider, and quite independently of the Executive Order and of the Department's procedural regulations. The respondents' argument, although substantially accepted by the courts below, puts the Secretary and the Department in the unattractive position of promising to petitioner that his case was being heard on specified charges and under described procedures and subsequently urging to the courts that both the charges and the procedures were quite immaterial to his removal.

The Government's argument, moreover, is squarely contradicted by every relevant word of the record. Indeed, it flies in the teeth of the affidavit of the former Secretary who says that he acted both under the Executive Order and the McCarran rider, and nowhere asserts that petitioner

was removed only "in the interests of the United States" under the McCarran Rider (R. 82). Instead, the Secretary twice expressly refers to the fact that his determination to discharge petitioner was undertaken pursuant to responsibility vested in him under "both" Executive Order 9835 and the McCarran Rider (R. 82). And in formally separating petitioner from the Department of State, the Secretary's Division of Foreign Service Personnel cited as termination authority for petitioner's discharge both Executive Order 9835 and the McCarran Rider (R. 84-85).

Whether or not the Secretary of State could otherwise have removed petitioner under the McCarran rider alone without charges, hearing, evidence or reason, the fact is that he did not do so, but purported to extend, with respect both to the McCarran rider and the Executive Order, the procedural protections of his regulations. The Court "in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196. The courts below, in assuming that the Secretary exercised his discretion in a vacuum and without reference to the Departmental procedures under which petitioner was charged and his case heard, have followed the Government briefs in preference to the record.

2. *The 1949 Regulations were Violated.* The 1949 regulations, under which petitioner was charged and tried, were in three respects violated by his removal.

(a) Under Sec. 395.6, a favorable decision of the Loyalty Security Board was to be reviewed by the Deputy Under Secretary and, if approved, the case was to be closed. The petitioner three times received a favorable decision from the Loyalty Security Board which was reviewed and approved by the Deputy Under Secretary. Under the regula-

tions, his case was closed. In fact, it was three times re-opened by an exercise of "post-audit" jurisdiction by the Loyalty Review Board, and the Secretary finally intervened in the case solely on the basis of its final decision.

(b) Both Executive Order 9835 (Part II, Sec. 3) and the regulations (Secs. 395.1 and 396.1) provide for an appeal to and a hearing before the Secretary or his designee before separation from employment; petitioner's request for an appeal to the Secretary made a few hours after notice of the Loyalty Review Board decision, was denied.

(c) The Secretary's decision following a hearing before him upon an appeal, as permitted by Secs. 395.1 and 396.1, quite clearly must be on the basis of the evidence "contained in the record or submitted at that hearing" (Sec. 396.12). The Secretary's affidavit concedes his failure to "read the testimony taken" or to "make any independent determination" as to petitioner's loyalty on the basis of "the evidence submitted . . ." (R. 82).

B. *The 1951 Regulations of the Department*

It was not until this case reached the District Court that the Government advanced the claim that the applicable regulations upon which petitioner's dismissal was based were those of 1951. The claim is somewhat startling since it was not until that moment that petitioner knew that the 1951 regulations even existed. We show here that they cannot be applied retroactively and without notice, and that even if applicable they, too, were violated.

1. *The 1951 Regulations Cannot be Applied to This Proceeding.* The Government would have the Court hold that the Department of State can initiate, prosecute and conclude a loyalty-security proceeding on the basis of one set of regulations and then support the result reached in those proceedings by a later set of regulations, which were not

published, and of which the petitioner had no notice and of whose alleged applicability to his case he was not advised, until this litigation reached the District Court.

It is true, of course, that not all administrative rules having retroactive application are either invalid or unfair. *Helvering* v. *Reynolds*, 313 U.S. 428; *Securities Comm'n.* v. *Chenery*, 332 U.S. 194, 203. Where a statutory purpose may be defeated unless permitted, an administrative rule may be given retroactive effect. *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619. The usual test applied by the courts when called upon to sanction retroactive application of an administrative rule is a determination whether such application will "work hardship upon [petitioner] altogether out of proportion to the public end to be accomplished." *N.L.R.B.* v. *Guy F. Atkinson*, 195 F. 2d, 141, 149 (C.A. 9); *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 534. It may, therefore, be within the power of an administrative agency to modify its procedural rules so as to have retrospective application to a case already pending before it under circumstances where "the ends of justice require it." *N.L.R.B.* v. *Monsanto Chemical Company* 205 F. 2d 763, 764 (C.A. 8).

However, the presumption is against retroactive rule making. Usually, it is held not to be within the powers delegated to the agency unless "the legislative intention to that effect unequivocally appears." *Miller* v. *United States*, 294 U.S. 435, 439. The presumption holds with especial force when retroactive application of a rule would alter the rights and duties of parties who may have relied on its predecessor. *United States* v. *Macdaniel*, 32 U.S. 1, 15. To say that the procedural standards which the Secretary of State was obliged to follow in this case were those contained in the 1951 regulations and not those imposed under the 1949 regulations would seem to go far beyond the bounds of any ret-

roactive application of administrative rules and regulations which the courts have tolerated in the past. Loyalty proceedings are nominally civil in nature; but they bear a disquieting resemblance to criminal proceedings in the consequences which are visited upon the employee who is dismissed under them. *Wieman* v. *Updegraff*, 344 U.S. 183, 191. In *Peters* v. *Hobby*, 349 U.S. 331, 344, this Court recognized that a limitation on the Loyalty Review Board's "review power to adverse determinations was in keeping with the deeply rooted principle of criminal law that a verdict of guilty is appealable while a verdict of acquittal is not." It seems, therefore, appropriate to note that laws which would effect retroactive changes with respect to substantial procedural rights are unconstitutional because *ex post facto* in nature. *Beazell* v. *Ohio et al.*, 269 U.S. 167, 170; *Kring* v. *Missouri*, 107 U.S. 221, 232; *Putty* v. *United States*, 220 F. 2d 473, 476 (C.A. 9).

The respondents concede that the 1951 Department of State Loyalty and Security Regulations were not published in the Federal Register.[25] The Government attempts to excuse this failure of publication on the grounds that the 1951 regulations dealt only with procedures applicable to Government employees and, it is respondents' view, were thus exempt from the requirements of publication found in the Federal Register Act [26] and the Administrative Procedure Act.[27]

The contention is not only distastefully technical but is also wrong. Section 5 of the Federal Register Act (49 Stat. 501, 44 U.S.C. Sec. 305(a) provides:

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[25] Cf. *Newman, Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 Har. L. Rev. 929, 933 (1950): "in effect, there has been an unwitting conspiracy to exclude from the Federal Register a huge quantity of documents that have general applicability and legal effect."

[26] 49 Stat. 500, 501, 44 U.S.C. Sec. 305.

[27] 60 Stat. 238, 5 U.S.C. Sec. 1002.

"(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided, That for the purposes of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.*" (Italics supplied.)

On its face the italicized clause would seem to cover loyalty-security regulations such as the 1951 regulations of the Department. Regulations of that kind prescribe one of the gravest of penalties, i.e., dismissal from Government employment and loss of personal and professional reputation as well as loss of retirement, pension and other financial penalties. There has been no authoritative construction of the requirement of Section 5 of the Federal Register Act that administrative orders or documents which prescribe penalties must be published. See, however, *Borak v. Biddle*, 141 F. 2d 278, certiorari denied, 323 U.S. 728, in which it was held that a Civil Service regulation which extended the probationary period (during which summary dismissal was permitted) for employees from six months to one year had no binding effect as to an employee who had not been given notice of the amended regulation, which had not been published in the Federal Register, prior to his dismissal.

The 1951 loyalty-security regulations of the Department of State "prescribe a penalty." Under the Federal

Register Act, they must be deemed "to have general applicability and legal effect" and thus must be published. Since they were not, and since petitioner was not given personal notice of them, as the Federal Register Act (49 Stat. 502, 44 U.S.C. Sec. 307) expressly provides, they can have no application to his case. *Borak* v. *Biddle*, *supra*; *Federal Broadcast System, Inc.* v. *F. C. C.*, 225 F. 2d 560, 568, certiorari denied, 350 U.S. 923; *Hotch* v. *United States*, 212 F. 2d 280, 283 (C.A. 9).[28]

The Government's argument that the 1951 regulations need not have been published, nor any notice given petitioner, is at the best an undignified one. It is made no more graceful by the fact that the 1949 regulations were meticulously forwarded to petitioner along with his letter of charges (R. 29), and thus established the whole framework of the proceedings.

It would have been on the whole less arbitrary for the Department of State to have given the petitioner no notice at all of the rules and procedures by which it intended to hear and determine his case, than to have required him to

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[28] It is probable, although unnecessary to decide, that the Administrative Procedure Act also required the Department to publish its 1951 loyalty security regulations in the Federal Register. Section 3 of that statute (60 Stat. 238, 5 U.S.C. Sec. 1002) exempts from publication "any matter relating solely to the internal management of an agency". It is by no means clear that the 1951 regulations of the Department fall within the excepted category. Apart from the public interest in regulations by means of which the loyalty and security of Federal employees are attempted to be insured, the 1951 regulations went beyond matters relating solely to the internal management of the Department of State but referred to, and in part depended on, operations and decisions of the Executive Branch of the Government as a whole, as well as of the Civil Service Commission and the Loyalty Review Board. Moreover, both the Senate and House Committees, in commenting on the exception to publication allowed matters relating solely to the internal management of an agency, noted that the exception should "not be construed to defeat the other provisions of Section 3 [requiring publication] or to permit withholding of information as to operations which remaining provisions of the section or of the whole bill require to be public or publicly available." S. Doc. 248, 79th Cong. 2d Sess., 1946, 198, 255.

guess at his hazard as to the controlling procedures. Instead, the Department of State tried him under one set of regulations and then the Department of Justice seeks to inform him, after the termination of the proceedings, that a different set of secret regulations were controlling in his case. We find it difficult to believe that this contention can seriously be urged upon this Court. If the Government continues to press the contention, the Solicitor General should be reminded that secret and retroactive application of administrative rules finds no sanction in our law. No more can it find support in common sense, or in common decency.

2. *The 1951 Regulations Were Themselves Violated.* Even if the Government could somehow persuade the Court that petitioner can be proceeded against under the 1949 regulations, and after dismissal be told that the case was really proceeding under a retroactive application of secret 1951 regulations, it would have gained nothing. For petitioner's discharge violated the 1951 regulations equally with those of 1949.

(a) Section 391.3 of the 1951 regulations make them applicable to action under the McCarran Rider. Section 393.1 of those regulations provides that decisions by the Secretary as well as the Loyalty Security Board "shall be reached after consideration of the complete file, arguments, briefs and testimony presented." Quite obviously, this requirement is not met by reading and relying solely upon an unlawful opinion of the Loyalty Review Board, while disregarding all other material in the case, as the former Secretary candidly admits he did (R. 82). Section 393.1 incorporated in an administrative rule the principle enunciated by this Court in *Morgan* v. *United States*, 298 U.S. 468, 481, that "the one who decides must hear." That principle has received recent application in the Loyalty Security field. *Kutcher* v. *Gray*, 199 F. 2d 783. The Court of Appeals for the District of Columbia there observed that under

the Executive Order which provided for the removal of employees on grounds relating to loyalty, final decision as to removal on those grounds rests with the head of the department or agency whose duty it is to order removal if grounds exist. The Court held that where the Administrator of the Veterans' Administration removed an employee on the basis solely of a finding by the Loyalty Board of the Veterans' Administration that the petitioner had been a member of an allegedly subversive organization, the Administrator had not complied with his duty "to impartially determine on all the evidence whether there were reasonable grounds for belief that Kutcher was disloyal to the Government of the United States." 199 F. 2d at 787. The decision applies *a fortiori* here, for the Administrator, in contrast to the Secretary, at least chose for his reading an opinion which was rendered lawfully. The Secretary's dismissal of petitioner under the McCarran Rider on the sole basis of the lawless opinion of the Loyalty Board, without considering the complete "file, arguments, briefs and testimony presented," as the basis for that decision, was a failure to comply with a similar duty to hear and decide which, in this instance, the Department's procedural rules put upon him.

(b) The 1951 regulations were violated in one other respect by the Secretary's dismissal of petitioner. Section 396.11 and 396.12 allow an appeal to the Secretary from a decision requiring removal from employment. That right of appeal was denied petitioner although requested of the Secretary (R. 72).

C. *The Secretary of State Is Bound By His Own Regulations.*

If a Government official or agency lawfully prescribes rules of procedure, they are binding on the Government as well as the citizen. The Secretary of State promulgated

regulations which, in the applicable 1949 version, promised (a) that a case was closed upon approval by the Deputy Under Secretary of favorable decisions; and (b) that there could be appeal to and hearing before the Secretary before action upon an unfavorable decision; and (c) that decision would be based on the "evidence" in the record. Having done so, he was bound by those regulations and could not lawfully ignore them, even though his substantive decision lay within his discretionary authority. *Bridges* v. *Wixon*, 326 U.S. 135, 153; *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 629; *Bilokumsky* v. *Tod*, 263 U.S. 149, 155. "As long as the regulations remain operative," the Secretary "denies himself the right to sidestep the Board," *Accardi* v. *Shaughnessy*, 347 U.S. 260, 267, to intervene to reopen and reverse a case which under his regulations is closed, or summarily to discharge an employee who by his regulations is entitled to an appeal.[29]

The settled principle that Government officials are bound

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[29] The principle has been frequently applied by the courts of appeal. The Second Circuit, for instance, requires that the discretionary power to suspend deportation be exercised in accord both with the procedural regulations, *United States ex rel Weddeke* v. *Watkins*, 166 F. 2d 369, 371, certiorari denied, 333 U.S. 876, and with the established practice, *United States* v. *McGrath*, 181 F. 2d 839, 841, dismissed as moot, 340 U.S. 940. The Sixth Circuit has invalidated a war surplus sale contract provision which forbade resale, contrary to the governing regulation, which "binds the administrator himself equally with others." *School District 2 Fractional* v. *United States*, 229 F. 2d 681, 685. The Court of Appeals for the District of Columbia Circuit recently held that the Secretary of Interior is bound by his own regulation promulgated pursuant to the Mineral Leasing Act so long as it remains in effect, since it has "the force of law." *McKay* v. *Wahlenmaier*, 226 F. 2d 35, 43. In other cases the courts of appeals have enforced an alien's right to procedural protection held out by administrative regulations governing discretionary action. *United States* v. *Perkins*, 79 F. 2d 533 (C.C.A. 2); *Sibray* v. *United States*, 282 Fed. 795 (C.C.A. 3); *Mah Shee* v. *White*, 242 Fed. 868 (C.C.A. 9). In two decisions, courts have gone so far as to forbid the agency to depart from its usual *practice*, even in the exercise of discretionary action. *N.L.R.B.* v. *Mall Tool Co.*, 119 F. 2d 700, 702 (C.C.A. 7); *Berchem* v. *R. F. C.*, 199 F. 2d 922 (Em. Ct. App.).

by their own validly promulgated regulations has no relation to the proposition upon which the Government relies. It is of course quite beyond argument that when an administrative agency properly exercises the discretion bestowed on it by the Congress to dismiss its employees, the courts will not substitute their judgment in these matters for that of the administrative agency. *Scher* v. *Weeks*, 231 F. 2d 494, certiorari denied 351 U. S. 973; *Williams* v. *Cravens*, 210 F. 2d 874, certiorari denied, 348 U. S. 819; *Eberlein* v. *United States*, 257 U. S. 82; *Keim* v. *United States*, 177 U. S. 290. The principle has nothing to do with this case. Here the so-called discretion of the Secretary was exercised in flat violation of his own regulations and on the sole basis of an unlawful opinion of the Loyalty Review Board.

Dismissal in disgrace as a loyalty or security risk from the service of the Government of the United States is a penalty which equals, indeed exceeds, in severity the imposition of a deportation order. In both cases "meticulous care must be exercised lest the procedure by which" the penalty is inflicted "not meet the essential standards of fairness" *Bridges* v. *Wixon*, 326 U. S. 135, 154. Those "essential standards" are hardly met when petitioner is formally assured of the protections offered by valid regulations only to have them wholly ignored when their assurances prove inconvenient to the Department.

Nor can the respondents justify the failure to observe procedural fairness in dismissing petitioner by relying on the unsupported dictum of the court below "that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk" (R. 98). Following his discharge from the Foreign Service, petitioner has been unable to obtain employment with earnings equal to what he was making at the time of his dismissal; all his life insurance was automatically cancelled and his

insurance company refused to insure his life; and housing accommodations also were denied petitioner and his family solely because of the unfavorable publicity which resulted from his discharge (R. 74). These facts portray the magnitude of the infamy which attaches in the public mind to a person dismissed from the service of his Government under the circumstances presented here. The public, unlike the Court of Appeals, cannot be expected to make technical distinctions between dismissals "in the interest of the United States" and those made under the Loyalty Program. Dismissal under either, as petitioner's experience shows, is one of the gravest penalties, in the terms of loss of good name and public esteem, which can be inflicted upon an individual.

D. *The Congress Confirmed the Department's Procedure Under the McCarran Rider*

The courts below did not follow the Government's argument in favor of the secret 1951 regulations but instead rested their decision upon the bald assertion that "It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188" (R. 88, 98).

The assertion is wholly unsupported and is contradicted by compelling evidence to the contrary. The State Department in the Spring of 1950 submitted to the Tydings Committee a comprehensive report on its procedures. This report is reproduced *in extenso* in the report of the Tydings Committee (S. Rept. 2108, 81st Cong. 2d Sess., pp. 14-18); the Committee in this respect said that it was "fully satisfied" with the departmental procedures (pp. 18, 23). The State Department report explained with wise insight the reasons for its decision; it specifically stated (pp. 15, 16):

> After enactment of the McCarran Rider the Department did not contemplate that the legislation required

> or that the people of this country would countenance the use of "Gestapo" methods of harassment or persecution of loyal employees who were American citizens on flimsy evidence or hearsay and innuendo * * * Accordingly, effective during the 1947 fiscal year, and each fiscal year thereafter, the Department considered the McCarran Rider as an additional standard for dealing with security problems in the Department * * * In [its] considered view the McCarran Rider was subject to procedural limitation. The McCarran Rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims * * * The unique powers conferred on the Department as a result of continuous reenactment of the McCarran Rider led the Department to promulgate regulations which would encompass its duties and powers both under the Executive Order and under the McCarran Rider.

The report of the Tydings Committee received an unprecedented amount of attention from the members of the Congress. The report was the subject of ten days of extended and heated debate on the floor of the Senate.[30] Senator McMahon, a member of the Tydings Committee, called the attention of the Senate to the fact that the State Depart-

[30] The debate in the Senate over the Tydings Report began even before the formal filing of the report with that body. 96 Cong. Rec. 10396-98, 81st Congress., 2d Sess., July 17, 1950. From that day through July 27, 1950, hardly a day passed without the Senate being drawn into discussion and debate over the report. *Ibid;* pp. 10493-95, 10568-70, 10686-89, 10691-96, 10697-10717, 10773-92, 10798-10803, 10805-10820, 10837-48, 10859-60, 10912-10960, 11172-83. On four days the Senate business was devoted almost entirely to the Tydings report. Some 45 Senators took a direct part in the debate; 12 of these were members of the Senate Committee on Appropriations which, of course, had primary responsibility in reporting out the State Department appropriation acts of which the McCarran Rider was a part. Four formal votes were taken in the Senate during the period the Tydings report was before it for consideration. In addition, three resolutions proposed by the minority were voted upon.

men, in its use of the McCarran Rider, applied the procedural protections of its regulations, 96 Cong. Rec. 10809. The McCarran Rider was, however, reenacted without change. 64 Stat. 768; 65 Stat. 575. The rule is settled that when Congress reenacts a statute with knowledge of the administrative construction which has been given it, that construction must be deemed to have received Congressional confirmation. *Labor Board* v. *Gullet Gin Co.*, 340 U.S. 361, 366; *United States* v. *Dakota-Montana Oil Company*, 288 U.S. 459, 466; *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 557; *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 492; *Fleming* v. *Mohawk*, 331 U.S. 111, 116; *Brooks* v. *Dewar*, 313 U.S. 354, 361; *Isbrandtsen-Moller Company* v. *United States*, 300 U.S. 139, 147; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301; *Mitchell* v. *United States*, 267 U.S. 341, 346; *Wells* v. *Nickles*, 104 U.S. 444, 447.

We do not believe, even were there no guidance whatever toward the legislative intent, that any court is entitled simply to assume that the Congress forbade the McCarran Rider discharge authority to be exercised pursuant to procedures designed to offer minimum protection to the rights of accused employees. Such an assertion by the courts below seems to us to pervert the standards both of human conduct and of statutory construction. But, as we have shown, their error is even more sweeping. The courts below did not have a clean slate to write on. The Congress was clearly informed and obviously knew that the State Department was applying Executive Order procedures to McCarran Act removals; with that knowledge, and without objection from any member of the Congress, it twice reenacted the McCarran Rider without change.

Finally, if more be needed to contradict the assumption of the courts below, it is provided by the Act of August 26, 1950 (64 Stat. 476, 5 U.S.C. Section 22-1 et seq.) This

permanent legislation replaced the McCarran Rider and provided procedures which very closely corresponded with those of Executive Order 9835. See *Cole* v. *Young*, 351 U.S. 536.

Conclusion

For the reasons stated, petitioner respectfully requests that this Court reverse the judgment of the Court of Appeals to the extent that the court below affirmed the District Court in its denial of petitioner's motion for summary judgment and its grant of respondents' cross-motion.

Respectfully submitted,

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January 1957.

APPENDIX A

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The "McCarran Rider" to Appropriation Acts of the U. S. Department of State (60 Stat. 458, 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768, 65 Stat. 575):

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Notes: (1) In the first of the cited provisions, for the Fiscal Year 1947, the final period as quoted above was a comma with the following clause added—

> "but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

(2) In the first three of the cited provisions, in place of the phrase "during the current fiscal year," there appeared the phrase "on or before June 30, [1947, 1948 or 1949]."

Executive Order No. 9835 (12 Fed. Reg. 1935):

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U.S.C. 611), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement

between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.
b. Civil Service Commission files.
c. Military and naval intelligence files.
d. The files of any other appropriate government investigative or intelligence agency.
e. House Committee on un-American files.
f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
g. Schools and colleges attended by applicant.
h. Former employers of applicant.
i. References given by applicant.
j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

Part II—Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as in the discretion of the employing department or agency, security considerations permit and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal to the head of the employing department or agency or to such person or persons as may be designated by such head under such regulations as may be prescribed by him, and the decisions of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three im-

partial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or

agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis

of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V—Standards.

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of

the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI—MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed

services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

The White House
March 21, 1947.

Executive Order No. 10241 (16 Fed. Reg. 3690):

AMENDING EXECUTIVE ORDER NO. 9835 ENTITLED "PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT"

By virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403) as amended, and section 9A of the act approved August 2, 1939 (5 U.S.C. 118), and as President of the United States, it is ordered that paragraph 1 of Part V of Executive Order No. 9835 of March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government", be, and it is hereby, amended to read as follows:

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

HARRY S. TRUMAN.

The White House,
April 28, 1951.

Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State, as adopted March 11, 1949:

391 *Authority and General Policy*

391.1 The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk.

391.2 The necessity for removing disloyal employees from the Federal service and for refusing employment therein to disloyal persons, and the obligation to protect employees and applicants from unfounded accusations of disloyalty, have been recognized in Executive Order 9835 which establishes the President's Loyalty Program. The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in Title 5, Chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State. So far as it relates to the handling of loyalty cases, the statement of procedure below is promulgated in accordance therewith.

391.3 In addition, the Secretary of State has been granted by Congress the right, in his absolute discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the inter-

ests of the United States. In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program.

392 *Loyalty Standard*

Part V of Executive Order 9835 provides as follows:

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as to-

talitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

393 *Security Principles of the Department of State*

393.1 *Categories Constituting Security Risks*

As used herein, an officer or employee constitutes a security risk when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified

information as to compel the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

393.2 *Determining a Security Risk*

In determining whether or not a person is a security risk, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to above, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violation of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of sec. 393.1.

393.3 *Considerations in Weighing Evidence*

393.31 A former course of conduct or holding of beliefs will be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.32 If a reasonable doubt exists as to whether the person falls into one of the categories listed in sec. 393.1, the Department will be given the benefit of the doubt, and the person will be deemed a security risk.

394 *Prehearing Procedures of the Loyalty and Security Board*

394.1 *Loyalty Cases*

394.11 All cases in which a report of a loyalty investigation is received shall be referred for consideration to the LSB which shall take action on every case so referred. The LSB shall examine the report of investigation and may request further investigation if such action appears to be necessary. Whenever practicable, such request shall be specific as to the additional information required.

394.12 The LSB shall consider the report of investigation in the light of the loyalty standard as set forth in sec. 392 and shall determine whether such report warrants a finding clearly favorable to the individual or appears to call for further processing of the case with a view to possible removal action. If the LSB reaches a clearly favorable conclusion, it shall so determine and recommend to the Assistant Secretary—Administration that favorable action be taken. If the LSB determines that such report does not warrant a finding clearly favorable to the individual, the procedures set forth in secs. 394.13, 394.14, 394.15, 394.16 shall be followed.

394.13 In all cases in which the evidence indicates that removal action may be warranted, the LSB shall serve the officer or employee with a notice in writing which shall state the nature of the charges against him in factual detail, setting forth in particular the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation.

394.14 The officer or employee shall be informed of his right to answer the charges in writing, under oath or affirmation, within a reasonable period of time, not less than 10 calendar days from the date of receipt by the employee of the notice; of his right to have an administrative hearing on the charges before the LSB not less than 15 calendar days before such hearing is to take place; and of his right to appear before the LSB personally, to be represented by counsel or representative of his own choosing, and to present evidence in his own behalf.

394.15 The notice shall be given to the employee at least 30 calendar days in advance of the effective date of the proposed removal action, except as provided in the Federal Personnel Manual. It shall state the work and pay status in which he will be carried during the notice and until the determination of the LSB, and the authority or authorities (Executive order and statute, if applicable) under which the notice is sent.

394.16 After giving the employee the foregoing notice, the LSB shall proceed as follows:

a. If the incumbent or excepted employee does not reply to the notice within the time specified by the LSB, the LSB shall consider the case on the complete file and recommended action to the Assistant Secretary—Administration.

b. If the incumbent or excepted employee answers the charges in writing but does not request a hearing, the LSB shall then consider the case on the complete file (including such answer) and recommend action to the Assistant Secretary—Administration.

c. If the incumbent or excepted employee requests a hearing before the LSB, a time and place for such hearing shall be set by the LSB, as convenient to the employee as circumstances permit and within the times specified in the notice of hearing referred to in secs. 394.13, 394.14 and 394.15 above, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense. This hearing shall

be conducted in accordance with the provisions of sec. 395.

394.2 *Security Cases.*

394.21 The LSB shall take action in the cases of all officers and employees which are referred to it by the responsible authorities of the Department.

394.22 The LSB shall make a determination in such cases that the officer or employee concerned shall be given the right of a hearing to determine whether his continued employment constitutes a security risk to the Department or whether, on the basis of the record presented, the continued employment of the officer or employee does not constitute a security risk to the Department.

394.23 If the LSB determines that the officer or employee should be given the right of a hearing, the procedures set forth in secs. 394.13-394.16 and 395, shall be followed.

395 *Hearing Procedure of the Loyalty and Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in sec. 394, before any officer or employee of the Department of State or of the Foreign Service of the United States is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him and be granted the right to a hearing before the LSB and an appeal to the Secretary of State, or his designee or designees. If he is charged with disloyalty, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interests of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the LSB may deem proper.

395.3 *Hearings*

395.31. The hearing shall be private and shall be attended only by the members of the LSB, other appropriate Government officials connected with the adjudication process, the officer or employee, his counsel or representative and the witness who is testifying.

395.32 The Chairman of the LSB shall preside; the officer or employee shall be permitted to appear personally, and either by himself or by his representative or counsel to present evidence in his own behalf, through witness or by affidavit.

395.33 Testimony shall be given under oath or affirmation. Members of the LSB may ask such questions of him and his witnesses as they may desire.

395.34 A stenotypist record will be made of the proceedings by a person or persons designated by the LSB and no other transcript shall be made. A copy of the transcript will be provided to the officer or employee upon request.

395.35 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the record of the hearing has been reduced to writing, the LSB will convene in executive session to reach a decision.

395.42 In its consideration, the LSB shall be governed by the loyalty standard provided in sec. 392 or the security principles provided in sec. 393, depending upon the nature of the case and the evidence submitted. After examination of the evidence and following any desired discussion, the vote shall be by ballot and the decision by majority vote. The vote by each member shall be recorded.

395.43. In arriving at its decision, the LSB shall take into consideration the fact that the employe may have been handicapped in his defense by the non-disclosure

to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

395.5 *Decision*

395.51 The decision of the LSB shall be one of the following:

a. The LSB recommends that, on the evidence submitted, the officer or employee should not be separated from employment under the loyalty standard referred to in sec. 392, or as a security risk under the security principles provided in sec. 393, and further recommends either that the case be closed or that further investigation be made along specific lines, with or without suspension; or

b. The LSB recommends that the officer or employee be separated from employment for disloyalty under the loyalty standard referred to in sec. 392 and as a security risk under the security principles provided in sec. 393; or

c. The LSB recommends that the officer or employee be separated from employment as a security risk under the security principles provided in sec. 393.

395.52 If the recommendation of the LSB is for separation from employment, it may, depending upon the nature of the case, the evidence presented, or consideration of mitigating circumstances, suggest that the officer or employee be dismissed or that, upon his request, he be permitted to resign.

395.53 The decision of the LSB shall be made in writing and shall be signed by the members of the LSB. It shall state the action taken and shall be made a permanent part of the record. The record shall be classified as secret and transmitted to the Assistant Secretary—Administration.

395.6 *Action by Assistant Secretary—Administration*

Upon receipt of the record including the decision of the LSB, the Assistant Secretary—Administration

shall take whatever action he deems appropriate with respect thereto and may, if the situation warrants, suspend the officer or employee pending further investigation or any appeal which may be made. If the decision of the LSB is favorable to the officer or employee concerned and is concurred in by the Assistant Secretary—Administration, he will so notify the officer or employee.

396 *Appeals*

396.1 *Notification of Separation and Right of Appeal*

396.11 If the decision is for separation from employment for disloyalty and as a security risk, or only as a security risk, the officer or employee shall be so notified by the Assistant Secretary—Administration and advised in writing of his right to appeal to the Secretary of State, or his designee or designees, within 10 calendar days after receipt of such notification. In those cases where separation from employment is contemplated only on the grounds of a security risk, the notice will state that the officer or employee is not considered disloyal by the Department.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary, or his designee or designees, will afford the officer or employee a hearing on the record at a date not earlier than one week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary, and/or his designee or designees, the officer or employee and a single counsel or representative of his own choosing. The officer or employee shall be permitted to appear personally, and either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary, or his designee or designees, nor will any new evidence be considered which is not contained in the record or submitted at that hearing as the statement or brief of the officer or employee concerned. A stenotypist record will be made of the proceedings

and a copy of the transcript will be provided to the officer or employee upon request.

396.2 *Decision Against Removal*

396.21 If, as a result of such hearing, the Secretary of State decides that there is insufficient evidence to support removal under the loyalty standard referred to in sec. 392, and under the security principles referred to in sec. 393, he may direct that the case be closed, that further investigation be conducted, or that the officer or employee be dismissed or permitted to resign as a security risk.

396.22 If the Secretary of State decides that there is insufficient evidence to support removal under the security principles referred to in sec. 393, he may direct that the case be closed or that further investigation be conducted.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing.

396.3 *Decision for Separation from Employment*

396.31 If, as a result of such hearing, the Secretary of State decides that the officer or employee should be separated from employment, the officer or employee will be so notified in writing. In such event the Secretary of State may, in addition, direct his suspension if he is not already suspended or may permit him to resign.

396.32 If the decision is that the officer or employee should be separated from employment for disloyalty and as a security risk, such notice shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 days after the receipt of the notice in the case of persons living within the continental United States and within 30 days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Advisory Recommendation by the Loyalty Review Board*

If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of State that the officer or employee should be removed from employment under the loyalty standard referred to in sec. 392, the Department will take prompt administrative action to remove him from employment.

396.5 *Action on Findings of the Loyalty Review Board*

396.51 If, after hearing an appeal from a decision that an officer or employee should be separated from employment for disloyalty and as a security risk, the Loyalty Review Board makes a finding that reasonable grounds do not exist for the belief that the officer or employee is disloyal, the Secretary of State, or his designee, may:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Permit the officer or employee to resign from the Department; or

c. Terminate the employment of the officer or employee under the authority conferred by Title I of the Appropriations Act of 1948 (McCarran Rider) or other appropriate authority.

396.52 Prior to final action, the Secretary of State, or his designee, may refer the case to the LSB and obtain a recommendation whether the officer or employee should be separated from employment as a security risk.

396.6 *Cases Involving Separations Not Subject to Review by the Civil Service Commission*

In the event of a decision that an officer or employee should be separated from employment only as a security

risk and the case does not fall within the category of cases subject to review by the Civil Service Commission, the Secretary of State will normally permit the officer or employee to resign from the Department in lieu of terminating his employment. This policy is adopted since no forum will exist outside the Department in which the officer or employee may affirmatively establish his loyalty.

396.7 *Decision that Employee is Loyal and Not a Security Risk*

If the Assistant Secretary—Administration or the Secretary of State shall, during his consideration of any case, decide affirmatively that an officer or employee is not disloyal and does not constitute a security risk and that his case should be closed, such officer or employee shall be restored to duty, if suspended, and the record shall show such decision.

Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State, as adopted May 4, 1951, and revised September 21, 1954:

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F.R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of pro-

cedures below is promulgated under the authority of these laws.

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the Board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with

the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of

the Government of the United States by force or violence. Present membership in any of the organizations designated by the Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of Government of the United States by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of Section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standards and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks

to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed necessary or advisable in the interest of national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organi-

zations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian, Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2, the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is received shall be referred for consideration to the Loyalty Security Board which shall take action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional information required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be requested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for administration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sec-

tions 394.13 through 394.18 and section 395 shall be followed.

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writing of the proposed removal action which shall state the nature of the charges against him in factual detail, setting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authori-

ties cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and or section 14 of the Veterans Preference Act of 1944; and for proposed removal on grounds relating to security shall be Public Law 733, 81st Congress, and General Appropriations Act, 1951, Section 1213; Public Law 759, 81st Congress.

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the board shall furnish the officer or employee a notice of the time and place when the board proposes to consider his case, in order that he, together with his counsel or representative, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Before making the determination, however, the board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board cannot require him to appear, and no inference or presumption

should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer or employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you should take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days subsequent to his receipt of the notice of charges, except as provided in section 22.2(a)(2) of Civil Service Commission Regulations.

394.2 *Cases Involving Security Only.*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the

Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in accordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in section 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyal Security Board to show why he should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal.*

As indicated in section 394, before any officer or employee of the Department of State is removed from em-

ployment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31 The hearings shall be before a panel of the Loyal Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyal Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice, and either by himself or by his representative or counsel to present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the

interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will not include all material in the file of the case, in that it will not include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the interrogatory, if any, and the evidence taken at the haring.

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witness as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyal Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing; but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be by majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

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395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyal Security Board determines that, on all the evidence, reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principle provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

e. The Loyalty Security Board determines that, on all the evidence, reasonable grounds exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyal Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall not be a part of the written decision and shall in no instance be furnished to the employee or his counsel. The complete file shall be classified as confidential and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty

grounds after a determination unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Government. In such exceptional circumstances, the board may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

396.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Security Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Se-

curity Board requires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government, but that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary and or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national se-

curity under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable grounds do not exist for belief that the officer's or employee's removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds exist for belief that the officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt

of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds exist for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board that board finds that reasonable grounds do not exist for belief that the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.